

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ULTIMATE TIMING, L.L.C., a Washington
limited liability company; and ARASH KIA,
an individual,

Plaintiffs,

v.

DAVID SIMMS, an individual; SA
INNOVATIONS, LLC d/b/a SAI TIMING &
TRACKING, a Michigan limited liability
company,

Defendants.

Case No. 2:08-CV-01632-MJP

**ORDER DENYING PLAINTIFFS'
MOTION TO CONSOLIDATE**

This matter is before the Court on Plaintiffs' motion to consolidate. (Dkt. No. 146.¹) The Court has considered the motion, Defendants' response (Dkt. No. 158), Tacit Solutions and Chronotrack's response (Case No. C10-0598MJP; Dkt. No. 71), the reply (Dkt. No. 160), and all other pertinent documents in the record. For the reasons set forth below, the Court DENIES the motion to consolidate.

Background

Plaintiffs move to consolidate Ultimate Timing, et al. v. Simms, et al. (C08-1632MJP) (the "Ultimate Timing" matter) with Tacit Solutions, Inc., v. Kia, et al. (C10-0598MJP) (the "Tacit Solutions" matter). A brief summary of the procedural posture of each case is a useful starting point for the Court's analysis.

¹ Unless otherwise noted, all citations to the docket refer to Ultimate Timing, et al. v. Simms, et al., C08-1632MJP.

1 I. The Ultimate Timing Action (C08-1632MJP)

2 On November 7, 2008, Ultimate Timing, L.L.C. and Arash Kia (together
3 “Ultimate/Kia”) filed a complaint against David Simms and SA Innovations, LLC (together
4 “Simms/SAI”) in this Court. (Dkt. No. 1.) In essence, the complaint alleges Kia developed a
5 novel process to time sports events using Radio Frequency Identification (“RFID”) tags and
6 Simms/SAI violated several agreements between the parties by misappropriating the
7 innovation. (Compl. ¶¶ 7-34.) The Court originally set March 25, 2009 as the deadline for
8 joinder, but extended the deadline to May 26, 2009. (Dkt. No. 23.) Discovery has ended, the
9 parties have filed cross-motions for summary judgment, and trial is set to begin on June 14,
10 2010.

11 II. The Tacit Solutions Action (C10-0598MJP)

12 On September 11, 2009, Tacit Solutions and Chronotrack Systems (together
13 “Tacit/Chronotrack”) filed a declaratory judgment action against Ultimate/Kia in Indiana
14 Superior Court. (C10-0598MJP; Dkt. No. 1-2 at 2.) Tacit/Chronotrack filed the matter after
15 receiving a series of demand letters from Ultimate/Kia, the first dated March 21, 2008,
16 asserting Tacit/Chronotrack misappropriated proprietary information. (*Id.* at 11, 14-15.)
17 Tacit/Chronotrack seek a declaration that they have not misappropriated trade secret
18 information from Ultimate/Kia. The matter was removed to federal court and, ultimately,
19 transferred to this district on April 2, 2010. Ultimate/Kia’s counterclaim alleges
20 Tacit/Chronotrack breached various agreements and misappropriated trade secrets.

21 **Discussion**

22 I. Motion to Strike

23 Tacit/Chronotrack ask the Court to strike all references to participation in a mediation
24 among the parties because mention of the participation violates the terms of the Agreement
25 to Mediate. (C10-0598MJP; Dkt. No. 71 at 4.) Asserting they “frankly forgot” the language
26 in the agreement, Ultimate/Kia withdraws the references. (Dkt. No. 160 at 6 n.2.) The

1 Court strikes those portions of the briefing and declarations that reference the mediation
2 participation and draws no inference based on Tacit/Chronotrack's participation.

3 Counsel's stated excuse that he forgot the terms of an agreement he negotiated is
4 concerning on several levels. (See Dkt. No. 160 at 6; Supp. Wright Decl., Ex. 1.) The Court
5 observes that the declaration has been submitted by an attorney whose pro hac vice status has
6 been revoked. (See Dkt. No. 102.) If Mr. Wright is continuing to work with other counsel
7 for Ultimate/Kia to prepare documents for this matter, the Court expects Mr. Baum is
8 supervising him to the extent required to affix Mr. Baum's own signature on the pleading
9 pursuant to Fed. R. Civ. P. 11. The Court further notes that it has twice sanctioned
10 Ultimate/Kia for failure to follow the rules governing discovery. (See Dkt. Nos. 102, 162.)
11 As this matter approaches trial, the Court reminds the parties they must comply with the civil
12 rules and this Court's orders, as well as the agreements reached among the parties.

13 II. Motion to Consolidate

14 If two cases "involve a common question of law or fact," Rule 42(a) provides the
15 Court may consolidate the actions or issue "any other orders to avoid unnecessary cost or
16 delay." Fed. R. Civ. P. 42(a). The Court considers a number of factors analyzing the
17 appropriateness of consolidation; those factors include judicial economy, whether
18 consolidation would expedite resolution, whether separate cases may yield inconsistent
19 results, and the potential prejudice to a party opposing consolidation. See 8 Moore's Federal
20 Practice – Civil § 42.10[4-5]. Consolidation may be inappropriate where two cases have been
21 proceeding on two vastly different schedules to trial. See Mills v. Beech Aircraft Corp., 886
22 F.2d 758, 762 (5th Cir. 1989).

23 First, there is no question consolidation would produce a significant delay in the
24 Ultimate Timing action. Under the scheduling order originally issued in the Tacit Solutions
25 action, the parties would complete the exchange of expert reports no later than January 7,
26 2011. (C10-0598MJP; Dkt. No. 52.) In contrast, the parties in the Ultimate Timing action

1 have completed the exchange of expert reports and the matter is set for trial in a few weeks
2 time. The differing progress of expert discovery is just one example of how these matters are
3 significantly far apart in terms of trial preparedness. Simms/SAI would be prejudiced by
4 having to postpone the resolution of this case. Likewise, Tacit/Chronotrack may be
5 prejudiced if they were forced to litigate their dispute on a compressed schedule as
6 Ultimate/Kia propose. The Court agrees with Simms/SAI's concern that consolidation at this
7 late phase would be "tantamount to allowing Plaintiffs to add additional parties and claims
8 long after the deadlines for doing so have passed." (Dkt. No. 158 at 10.) Ultimate/Kia had
9 the opportunity to join Tacit/Chronotrack if they intended to follow up on their demand
10 letters, but failed to do so before the joinder deadline. Simms/SAI should not be prejudiced
11 by their failure to do so. The Court finds that the matters' disparate progress weighs strongly
12 against consolidation.

13 Second, though the factual allegations overlap, Ultimate/Kia's claims against the
14 parties at hand are distinct. In particular, the alleged agreements at issue in the Ultimate
15 Timing action are different from the ones alleged in the Tacit Solutions case. (See C10-
16 0598MJP; Dkt. No. 71 at 8.) Washington law governs the alleged nondisclosure agreement
17 between Ultimate/Kia and Simms/SAI and Indiana law controls the Ultimate/Kia agreement
18 with Tacit/Chronotrack. (Id. at 9.) There is at least potential for confusion if a jury were
19 asked to apply different substantive law to purportedly parallel agreements. The lack of
20 overlap in the substantive claims further suggests consolidation is inappropriate.

21 Given the differences in trial preparedness and substantive claims, the Court finds
22 consolidation is inappropriate.

23 Conclusion

24 The Court DENIES Ultimate/Kia's motion to consolidate. (Dkt. No. 146.) The
25 Ultimate Timing action is almost ready for trial, while the Tacit Solutions case is not. The
26 Court further grants Tacit/Chronotracks' motion to strike the mention of the mediation from

1 the briefing on this issue. The Court directs the Clerk to transmit copies of this Order to all
2 counsel of record and post a copy of this Order on the docket in C10-0598MJP.

3 Dated this 10th day of May, 2010.

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6 Marsha J. Pechman
7 United States District Judge
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